

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

RECEIVED

NOV 30 1995

FEDERAL COMMUNICATIONS COMMISSION

DOCKET FILE COPY ORIGINAL

In the Matter of
Revision of Rules and Policies for
the Direct Broadcast Satellite Service

IB Docket No. 95-168
PP Docket No. 93-253

REPLY COMMENTS OF TIME WARNER ENTERTAINMENT CO., L.P.

Time Warner Entertainment Company, L.P. ("TWE") hereby submits these reply comments in the Commission's Notice of Proposed Rulemaking in the above referenced proceeding (the "Notice").¹ Specifically, TWE opposes the comments of the Department of Justice ("DOJ") and other parties who support the imposition of unnecessary barriers to the participation of cable-affiliated entities in the direct broadcast satellite ("DBS") industry.² Most notably, the DOJ supports the Commission's

¹ In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking in IB Docket No. 95-168 and PP Docket No. 93-253, FCC 95-443 (released October 30, 1995).

² In addition, TWE reiterates its belief that these competitive issues are separate and distinct from the primary purpose of the Notice. As the initial comments filed in this proceeding indicate, the competitive issues addressed in the Notice raise a plethora of serious concerns and have produced wide-ranging opposition. See, e.g., Comments of National Cable Television Association; Comments of DirecTV; Comments of Tempo DBS, Inc. Even parties which speak in favor of the Commission's goals disagree greatly as to the scope, application and final impact of any such measures. See, e.g., NYNEX Comments (one of several commenters disagreeing as to the extent to which

(continued...)

No. of Copies rec'd C + Y
List ABCDE

regulatory initiatives by proposing that the Commission impose an absolute prohibition against larger cable firms "owning, using, or controlling DBS channels in any of the three primary full-CONUS orbital slots."³ However, in doing so, the DOJ ignores substantial record evidence and the prior determinations of Congress, the Commission, and the DOJ itself. As TWE stated in its initial comments in this proceeding,⁴ current market conditions simply do not warrant a deviation from these prior policy decisions.⁵

²(...continued)
restrictions should apply to non-cable entities); Comments of DirecTV (selectively favoring and opposing various Commission restrictions on market behavior). The sheer diversity of these opinions firmly supports TWE's position that the Commission should not endeavor to address complex competitive issues in a docket proceeding primarily dedicated to spectrum allocation and competitive bidding -- issues which the Commission has an admitted interest in deciding quickly. If necessary at all, such issues should be addressed in a separate, subsequent proceeding which will allow the appropriate time and consideration to responsibly address these issues. See Notice, Statement of Commissioner Andrew C. Barrett, Dissenting in Part and Concurring in Part at 2 ("our program access rules . . . should be reviewed, and if appropriate, modified in an independent proceeding.").

³ Comments of the United States Department of Justice at 9 ("DOJ Comments"). In addition, MCI supports a similar ban on large cable firm participation in DBS. Other parties also offer their own permutations of the Notice's proposed entry restrictions. While these reply comments respond primarily to the comments of the DOJ, TWE reiterates that the evidence and arguments raised in TWE's initial comments and these reply comments amply demonstrate that behavioral or structural restrictions on DBS participation of any kind are unwarranted.

⁴ See "Comments of Time Warner Entertainment Company, L.P.," filed in IB Docket No. 95-168/PP Docket No. 93-253 on November 20, 1995 ("TWE Comments").

⁵ For similar reasons, TWE also reaffirms its opposition to the proposal of the Notice and some commenters that the
(continued...)

**I. NEITHER THE DOJ, NOR ANY OTHER COMMENTING PARTY,
PRODUCES EVIDENCE TO JUSTIFY IMPOSING RESTRICTIONS ON
PARTICIPATION IN THE DBS INDUSTRY.**

In supporting a prohibition on MSO participation in DBS, the DOJ Comments describe a wide variety of theoretical scenarios which could result if restrictions on cable participation in the DBS industry are not implemented. Like the Commission, the DOJ theorizes that a firm which holds interests in both cable and DBS could have less incentive to offer DBS service which competes with cable due to its interest in maximizing its aggregate cable and DBS profits.⁶ Although the DOJ admits such an occurrence is unlikely, the DOJ hypothesizes that such incentives could cause cable-affiliated DBS companies to "provide service grossly inferior to DBS service or even no DBS service at all, offering little or no competition to cable."⁷ In addition, the DOJ argues that structural safeguards are necessary due to the limited amount of full-CONUS DBS orbital slots available, again theorizing that cable firms could potentially control all the

⁵(...continued)
existing program access rules are deficient and that more stringent rules need to be adopted for specific application to the DBS industry. See, e.g., Comments of Echostar Satellite Corporation and Directsat Corporation at 48-56; Comments of BellSouth Corporation at 8. Again, these commenters fail to provide any substantive evidence why extension of the program access rules beyond the scope Congress intended is necessary. Thus, TWE relies on its previously submitted economic, statistical, and legal support for why additional program access rules are unjustified. TWE Comments at 11-15.

⁶ DOJ Comments at 6.

⁷ Id.

available DBS spectrum.⁸ These "doomsday" projections appear to be based on nothing more than conjecture and run contrary to the present market evidence and the conclusions of every governmental body which has previously reviewed the DBS industry.

As TWE noted in its initial comments, the DBS industry is highly competitive and has already had an enormous impact on the multi-channel video program distributor ("MVPD") market.⁹ Despite the presence of a cable-affiliated competitor, the DirectTV-USSB DBS satellite dish has become the fastest selling consumer electronics product ever, amassing over one million customers in its first 13 months of availability.¹⁰ With both DirectTV and USSB firmly established in the MVPD market, and the entry of other non-cable DBS competitors imminent,¹¹ it is simply implausible that any cable-affiliated market participants could offer anything less than vigorously competitive service to its customers. As the Sixth Circuit Court of Appeals recently noted in striking down entry barriers similar to those proposed by the DOJ, the only rational conclusion, given the high cost of

⁸ Id. at 7.

⁹ See "DirectTV Takes on Cable," USA Today, November 28, 1995, p. B1-B2 (documenting the direct competitive effect DBS has had on the cable industry and the unprecedented growth of DBS service) (attached).

¹⁰ Id. at B1.

¹¹ In addition to DirectTV and USSB, four other companies (Continental, Echostar/Directsat, Dominion, and DBSC) currently hold licenses to construct DBS facilities, with Echostar and Alphastar poised to offer service by the end of this year. In addition, Ka-band applicants promise to provide powerful competition in the near future. See TWE Comments at 5-6.

implementing DBS service,¹² "is that a business competing at a less than efficient level will soon be driven out of the market."¹³

This absolute need for cable-affiliated DBS operators to behave competitively will be further heightened by the emergence of more high-powered players in the DBS industry. Indeed, present and future DBS participants include such corporate giants as General Motors, NYNEX, MCI, and BellSouth.¹⁴ Given the presence of such highly capitalized interests in an auction environment, the DOJ's notion that cable entities could somehow outbid or otherwise overtake these competitors to acquire dominant control over the available full-CONUS DBS spectrum belies reason.

These market realities have been confirmed by every government entity which has seriously examined the status of the DBS industry. Both Congress and the Commission have specifically determined that cross-ownership limitations on cable

¹² Primestar has stated that implementation of its system has required the commitment of over \$1 billion. See Comments of Primestar Partners, L.P. at 22.

¹³ Cincinnati Bell Telephone, et al. v. F.C.C. et al., Nos. 94-3701/4113; 95-3023/3238/3315, slip op. at 12 (6th Cir. November 9, 1995) (federal court determined that there simply was no obvious reason why cellular companies entering the PCS market would have an incentive to compete less than vigorously).

¹⁴ General Motors has a substantial ownership interest in DirecTV, the current dominant DBS provider. In their initial comments in this proceeding, MCI, NYNEX, and BellSouth all openly committed to vigorously compete for all available DBS spectrum.

participation in DBS are unnecessary.¹⁵ As TWE has stated previously, the DBS industry has only grown more competitive since these determinations were made.¹⁶ Neither the DOJ nor the Notice offers any rationale why the Commission may lawfully disregard these prior policy decisions.¹⁷

II. THE COMMISSION LACKS LEGAL AUTHORITY TO IMPOSE ANTITRUST REGULATIONS ON THE DBS INDUSTRY.

Given that all market evidence and prior analysis argues against the imposition of structural and behavioral regulations in the DBS industry, the Commission is without legal justification to adopt the entry restrictions proposed by the DOJ and the Notice.¹⁸ The limitations on the Commission's power to prevent free market participation were most recently affirmed in Cincinnati Bell, et al. v. F.C.C., et al., supra. In that case, the Sixth Circuit Court of Appeals held that the Commission may not, as the DOJ suggests, impose significant market restrictions

¹⁵ See Continental Satellite Corporation, et al., 4 FCC Rcd. 6292, 6299 (1989) (Commission noting the positive competitive effect of MSO entry into the DBS industry). In addition, Congress specifically considered, and rejected, DBS cross-ownership restrictions in connection with its adoption of the 1992 Cable Act. H.R. Rep. No. 862, 102d Cong., 2d Sess. 56 (1992) (deleting portion of the Senate bill requiring adoption of cross-ownership restrictions for DBS systems).

¹⁶ See, e.g., "DirectTV Takes On Cable," supra.

¹⁷ See, e.g., Greater Boston Television Corporation v. F.C.C., 44 F.2d 841, 852 (D.C.Cir. 1970) ("an agency changing its course must supply a reasoned analysis" for why the prior policy is not being followed).

¹⁸ See City of Brookings Mun. Tel. Co. v. F.C.C., 822 F.2d 1153, 1165 (D.C.Cir. 1987) (the Commission must articulate a rational connection between the facts found and the choice made).

based upon a belief that "potential" or "theoretical" anticompetitive incentives may exist. As the court stated, such "'predictive judgement[s]'" as to the possible future behavior of future marketplace entrants [are] highly suspect" and must be supported by statistical data, economic theory, or expert economic data consistent with the record evidence.¹⁹ Mere "common-sense" conclusions regarding competitive market behavior based on the Commission's expertise simply do not warrant legal deference.

The legal limits placed upon the Commission's ability to impose restrictions on market participation recognize the basic fact that the Commission was not created for the purpose of fashioning antitrust policies. Rather, the Commission is entrusted with disseminating "rapid, efficient, nation-wide, and world-wide" communications service²⁰ and, more specifically, instructed to rely on the marketplace rather than regulation to provide the widest diversity of programming sources to the public.²¹ Contrary to the DOJ's assertion,²² the Commission may

¹⁹ Cincinnati Bell, et al., supra, at 11-12. The need for government restrictions to serve a tangible, and not a speculative, government interest is particularly acute where, as here, the proposed restrictions infringe upon activities protected by the First Amendment. See Turner Broadcasting System v. F.C.C., 114 S.Ct. 2445 (1994) (as an entity with First Amendment rights, restrictions which affect the speech of cable systems may not be imposed without serving a substantial government interest).

²⁰ 47 U.S.C § 151.

²¹ 1992 Cable Act § 2(b) ("It is the policy of Congress in this Act to . . . promote the availability to the public of a
(continued...)

not divert its attention from these primary mandates for the purpose of equalizing competitors in the MVPD marketplace. Indeed, courts have previously struck down antitrust measures adopted by the Commission for being directly at odds with the public interest in rapid, efficient telecommunications service.²³ It was for the express purpose of serving the Commission's overarching interest in the rapid dissemination of DBS service that the Commission previously determined that cable participation in the DBS industry was in the public interest.²⁴ The Commission may not now disregard its statutory directives in order to adopt unnecessary antitrust measures which the DOJ -- the agency entrusted with enforcing antitrust policy -- declined to impose.

²¹(...continued)
diversity of views and information through cable television and other distribution media" and "rely on the marketplace, to the maximum extent feasible, to achieve that availability.").

²² See DOJ Comments at 2 ("federal agencies must take into account . . . antitrust and competitive concerns").

²³ See, e.g., Hawaiian Telephone Company v. F.C.C., 498 F.2d 771 (D.C.Cir. 1974) (concern over equalizing competition subverted the Commission's statutory duties); United States of America v. F.C.C., 652 F.2d 72 (D.C.Cir. 1980) (the Commission is not charged with enforcing antitrust laws).

²⁴ Continental Satellite Corporation, et al., supra, at 6299.

CONCLUSION

Neither the DOJ nor any of the commenting parties provide sufficient justification for imposing structural or behavioral restrictions on cable participation in the DBS industry. Absent such justification, the Commission should follow its statutory mandate and refrain from imposing the unlawful restrictions proposed by the DOJ and the Notice.

Respectfully submitted,

TIME WARNER ENTERTAINMENT CO., L.P.

By 

Brian Conboy
Todd G. Hartman

WILLKIE FARR & GALLAGHER
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20036-3384
(202) 328-8000

Attorneys for Time Warner
Entertainment Company, L.P.

November 30, 1995

ATTACHMENT

DirecTV takes on cable



Sign of the times: DirecTV President Eddy Hartsenstein shows a satellite dish, about the size of a large pizza, that's used to bring programming to its 1 million customers.

20th Century considers fees for brokers

By John Waggoner
USA TODAY

The Twentieth Century funds have shunned brokers for decades. That may change.

The Kansas City, Mo., fund group is considering adding new classes of fund shares for stockbrokers, banks and financial planners to sell, says *Mutual Fund Market News*, an industry newsletter. The shares would pay those brokers an annual fee of 0.25% of the value of their client's shares.

Other investors could still invest directly in the same funds without paying a fee. "The new shares won't affect the no-load investor," says Twentieth Century spokesman Chris Doyle.

Why sell through banks and brokers? It's where the money is. About 53% of all fund shares are sold through brokers, according to the Investment Company Institute, the funds' trade group. "We don't want our funds to be denied to people who invest through those channels," Doyle says.

The proposed 0.25% fee is well below mutual fund standards. Many funds pay brokers 0.5% or more to sell their funds. But Twentieth Century funds are hugely popular. Twentieth Century Ultra has \$14 billion in assets, making it the nation's sixth-largest stock mutual fund.

The move to add share classes is part of the \$45 billion Twentieth Century group's strategy to become one of the nation's largest mutual fund companies. It's now ranks No. 15. "They're shooting for the top," says Don Phillips, editor of *Morningstar*.

COVER STORY

Dishing up signal to 1 million homes

Doubts of long-term visibility remain

By David J. Lynch
USA TODAY

LOS ANGELES — Faster than VCRs. Faster than color TV sets. Faster even than the previous all-time consumer electronics sales king, compact disc players. That's how fast DirecTV, the satellite-to-home TV system, reached a million customers.

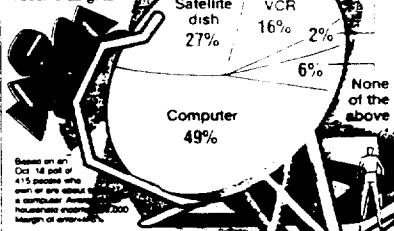
Once derided as too much TV for today and not enough for tomorrow, DirecTV — which signed its one millionth customer Nov. 2 after just 13 months — now boasts an enviable track record in home entertainment. With laser-crisp video and CD-like sound, it's attracting customers to a menu of familiar cable programming plus exclusive sports and pay-per-view extras. But for parent company GM Hughes Electronics, this is no time to gloat.

"We think we've established ourselves," says Hughes Chairman C. Michael Armstrong, interviewed in his office near Los Angeles International Airport. "(But) we've got a

Please see COVER STORY next page ▶

Tech wish list

What computer buffs say they would most like to receive as gifts



Source: USA TODAY/Regisearch survey

By Laura Martin, USA TODAY

DirecTV shoots for moon

Continued from 1B

heckuva lot to do ahead of us."

It will be at least another year before DirecTV, bleeding at a \$150 million annual rate, breaks even. Meanwhile PrimeStar, a competing system with 953,000 customers, is closing in. New rivals, including MCI-News Corp., wait in the wings.

Armstrong, the former IBM executive hired in 1992 to prepare Hughes for the post-Cold-War world, is shooting for 3 million customers by the end of 1996 and 10 million by 2000. If successful, Hughes' space-based money machine — based across the tarmac from Armstrong's comfortable lair — will be generating \$1 billion in net income in five years. That's huge money at Hughes, which earned \$925.4 million last year. For now, the holiday shopping season will be crucial. Eddy Hartenstein, DirecTV's president, notes that consumer electronics typically rack up 50% of annual sales in the final 100 days of a year.

From a state-of-the-art broadcast center in Castle Rock, Colo., DirecTV beams 175 channels of programming to three satellites 22,300 miles above the ground. The satellites then convey the signals to small-dish receivers at customers' homes.

Jaw-dropping technology is an important part of this direct broadcast system. Hughes devised a way to

squeeze 10 channels of digital programming through each satellite transponder using techniques pioneered for the military. The satellites' high power, 120 watts per transponder vs. 20 watts for conventional analog signals, translates into a small dish on the ground — not the backyard behemoths of earlier systems.

For many consumers, DirecTV's most appealing feature is that it's not the local cable company. Satellite TV first targeted customers in areas without cable service. But capitalizing on consumer frustration with poor cable service, DirecTV and Prime Star, a partnership of six cable companies, have been able to attract about half their subscribers from cable neighborhoods. There are more where they came from: A 1995 survey by San Francisco-based research firm Odyssey found 55% of cable customers are "very likely" to switch TV providers.

Just ask David Farquhar, 73, a retired school teacher in Redlands, Calif., who bought DirecTV for his film-buff wife and granddaughter. "We wanted some other choices," he says. "Cable is generally rotten, and I didn't want a giant dish."

With more than 62 million customers, the cable industry dwarfs direct broadcast TV. But the customers switching to satellite TV are often cable's best, boasting a median household income of about \$41,000, almost

About GM Hughes' DirecTV

► **What is it?** DirecTV is a direct broadcast TV service that beams 175 channels of programs to small dish receivers mounted on homes.

► **What does it offer that cable doesn't?** Along with about 60 familiar cable channels — CNN, ESPN and Court TV — DirecTV provides 60 pay-per-movie channels and exclusive sports programming. The movies are available at the same time they hit video stores but can be ordered from home and start as often as every half hour. Sports include NBA, NHL and baseball, plus college sports and regional channels.

► **How much does it cost?** The dish and set-top box cost about \$550. The price is expected to fall next year as additional hardware

makers join Sony and Thomson Electronics, which sells the RCA brand. Monthly charges vary, but most customers opt for a \$29.95-per-month package. Pay-per-view movies cost \$2.99 to \$4.99 each and the special sports packages are extra. Example: NFL season ticket costs \$139.

► **Where can I buy DirecTV?** A network of 18,000 retailers nationwide, including Sears, Circuit City, Montgomery Ward, Price Club and Robinsons May.

► **Is there competition?** Rivals include PrimeStar, which allows consumers to lease rather than buy the hardware. Next year, Alphastar and EchoStar begin operations. Over the next few years, cable and telephone companies will join the fight.

one-third higher than the national average, plus a willingness to spend extra for pay-per-view events. "There are some consumers who are itching to throw their cable company overboard," says Nick Donatello, Odyssey's president. "That's what's driving this market."

Satellite systems like DirecTV also have politicians to thank for their success. The 1992 cable act granted satellite broadcasters access to the same programming cable companies carry. Before that, programmers were reluctant to sign with satellite services for fear of alienating the cable operators.

But there are drawbacks to direct

broadcast TV. For technical reasons, DirecTV can't carry local network affiliates. Viewers in, say, Hartford, Conn., who want to watch CBS affiliate WFSB must keep their basic cable service or rely on an antenna to pull in the signal.

Likewise, some popular premium cable channels, such as HBO and Showtime, must be purchased through a separate company, USSB, which rents space on Hughes satellites. That means two bills every month. Heavy rain can cause outages. (Officials say a typical user loses two hours a year.) And it's more cumbersome to record programs with DirecTV, analysts say.

But perhaps the biggest hurdle is cost. To receive DirecTV, consumers must first buy an 18" diameter satellite dish plus a set-top box, which translates the digital signal into TV images. Today, with manufacturers Thomson Consumer Electronics and Sony competing for hardware sales, the package costs about \$550.

Bargain hunters might want to wait. New York brokerage Cowen & Co. says the price will fall to \$499 in January and \$399 in 12 months. Some analysts think rival Prime Star's "\$1-a-day" lease plan will give it an advantage as the fight to sell satellite TV moves beyond the roughly 2 million videophile households.

DirecTV also will face at least two more satellite TV providers next year. Neither plans to go head-to-head with Hughes. But both threaten to siphon off enough customers to slow Hughes' progress toward the 3 million customer break-even mark. Analysts peg the total direct broadcast market at 7 million to 12 million customers by 2000.

Alphastar, the U.S. arm of the Canadian company Tee-Comm Electronics, will provide up to 120 channels using leased space on a new AT&T satellite. The company is searching for investors and has adopted an unusual distribution strategy. It'll be peddled door-to-door by Amway salespeople. Alphastar is concentrating on niche markets, such as ethnic channels for the 23 million foreign-born U.S. residents.

Says spokesman Clive Hudson: "It sounds a little obscure ... But we think niche programming will be something to distinguish us." It might work. After all, thanks to start-up

costs well below Hughes' \$750 million investment, Alphastar needs just 500,000 customers to break even.

EchoStar of Englewood, Colo., is scheduled to launch its first satellite aboard a Chinese rocket Dec. 28. The company is betting that low-priced packages from an initial line-up of 100 channels will woo a significant number of customers beginning early next year. Additional competition is likely later this decade from MCI and News Corp., which have yet to finalize plans, and local cable and telephone companies.

DirecTV's future may rest on its being first with interactive services. Because of technical limitations, the Hughes system is incapable of the most demanding offerings, such as movies on demand, which fiber-optic cable is expected to offer in a few years. But using a telephone modem in the set-top box, DirecTV could allow customers by the second half of 1996 to shop on line or request statistics while watching their favorite football team. That might be all the interactivity consumers want, DirecTV executives say.

Hughes also is rethinking its initial opposition to developing content for its space-based distribution network. "I do not see us being a competitor to the studios — Paramount, Disney, Viacom," says Armstrong, lounging in an office chair. "However, I do see us doing alliances, having partnerships, joint ventures, or — who knows? — potentially an equity relationship. There are a number of situations under consideration."

He smiles. Over his right shoulder smack in the middle of his desk, is a sign: "Assume nothing."